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Panel: The Impending Extraordinary Chambers of Cambodia to Prosecute the Khmer Rouge

*Beth Van Schaack, Moderator **

The Khmer Rouge, otherwise known as the Party of Democratic Kampuchea, seized power in Cambodia on April 17, 1975 — year zero in what turned out to be a four-year campaign to create the New Cambodia. The draconian measures instituted by the Khmer Rouge regime in the quest for this “New Cambodia” included: the liquidation of members of the former regime; the extermination of the elite and educated; a complete evacuation of the urban centers; the incineration of books, libraries, banks, places of worship, and university facilities; the criminalization of the usage of foreign languages; the abolition of money, private property, markets, wages, and salaries; the dissolution of families and the separation of children from their parents; the execution of ethnic minorities; the prohibition of religious practice and education; and the systematic hunt for real and imagined political opponents. The Khmer Rouge regime was finally halted when Vietnam — with assistance from former Khmer Rouge functionaries — invaded Cambodia on January 7, 1979 and installed the People’s Republic of Kampuchea. By the time the Vietnamese opened the killing fields for all the world to see, approximately two million people had perished. Nonetheless, Western anti-communism tinged with lingering United States animosity toward Vietnam led the United Nations to allow the Khmer Rouge government to retain its seat in the U.N. General Assembly as a “government-in-exile.”

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At this time, there were efforts to stage a legal accounting for crimes committed by the Khmer Rouge. Advocates proposed a case before the International Court of Justice pursuant to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide,¹ which vests the ICJ with jurisdiction over disputes relating to “the interpretation, application or fulfillment” of the Convention. No state, however, stepped forward to call Cambodia to account. There was also talk about prosecutions of key figures in third states, under principles of universal jurisdiction, but potential defendants remained elusive and no state stepped led the charge. Impunity thus settled in.

Almost two decades later, Cambodia’s co-Prime Ministers wrote to the U.N. Secretary-General requesting assistance with the establishment of an international tribunal to prosecute surviving members of the Khmer Rouge regime. To start, the General Assembly appointed a Commission of Experts to examine the evidence. It recommended the establishment of a tribunal in the model of the International Criminal Tribunals for the former Yugoslavia and Rwanda, under either Chapter VI or VII of the U.N. Charter, that would be based in Thailand or elsewhere outside of Cambodia. In contrast, the Cambodian government had proposed a hybrid, or mixed, tribunal based domestically. The Commission rejected this proposal based on concerns about the prevalence of corruption and political influence in the judiciary, the quality of the members of the local bar, and the ability of the local courts to meet international due process standards.² The Security Council did not act on the Commission’s recommendation, so the Secretary-General began negotiations with the government of Cambodia to establish the quasi-international tribunal that was favored by the government.

This heralded a long and complicated dance between the state of Cambodia and the international community, with the United Nations and the Secretary General’s office trying to negotiate a solution that would adhere to international norms and also satisfy the increasing demands of the Cambodian government for the desired level of autonomy and control over the system. Several contentious issues emerged immediately regarding institutional design (such as whether there would be a majority of international or domestic personnel and who would appoint key personnel) and the validity of a prior amnesty enacted for members of the Khmer

1. Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).
2. See Report of the Group of Experts for Cambodia, established pursuant to G.A. Res. 52/135, U.N. GAOR, 53d Sess., Annex, 110, U.N. Doc. A/53/850, S/1999/231 (Mar. 16, 1999).

Rouge. After protracted negotiations, from which the Secretary General at one point withdrew only to be sent back to the negotiating table by the General Assembly, the parties agreed on a hybrid tribunal with international and domestic components. For example, international and domestic staff will work in tandem. The law is a mix of international and domestic law. The General Assembly eventually approved the agreement between the United Nations and the Royal Government of Cambodia in 2003 and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were born.

We now have an institution that is located outside of Phnom Penh in a very fitting, solemn, and dignified compound. The international community and the Cambodian Government have chosen the judges, whose wranglings about procedural rules have almost derailed the process. During these talks, deep concerns emerged that the Cambodian judges are essentially beholden to the government, because the international judges and the Cambodian judges have been on diametrically opposite sides of virtually every debate.

This panel has been convened to discuss the promises and challenges of staging an accounting for the Khmer Rouge era in Cambodia in the Extraordinary Chambers in the Courts of Cambodia. The hybrid model adopted offers the promise of a more visible and integrated system, capable of contributing to the establishment of the rule of law in traumatized societies. At the same time, it presents grave risks of inefficiencies, corruption, and political influence by a government intent on protecting, and expanding, its political power. The panelists convened here today will discuss different aspects of this dilemma in light of their own research perspectives.

*Jaya Ramji-Nogales, Panelist**

As a preface to my talk, I just want to say this idea is in development, so I am interested in feedback, both from the audience and from the other panelists. I want to take a deeper look at the phenomenon of hybrid tribunals and their ability to provide justice in a highly politicized environment, which is the environment you often see in the wake of mass violence. I am particularly interested today in the

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question of legitimacy, which scholars have posited as one of the advantages of hybrid tribunals. But legitimacy has presented some pretty thorny problems in Cambodia.

I am going to look at several players, each of whom may have a different definition of legitimacy; offer a critique of the current practice of hybrid tribunals; and provide suggestions for future efforts. I will also present a concept that I am labeling “true hybridity,” which means relinquishing preconceived Western ideas about sources of legitimacy in a society, and engaging more deeply with local traditions of legitimacy.

I am going to start with the term, “legitimacy.” Scholars such as Laura Dickinson³ and Bill Burke-White⁴ offer increased legitimacy as a rationale for hybrid courts. I will borrow their definition of legitimacy, which is essentially “buy-in”: Are the decisions of the tribunal acceptable to the populations observing its procedures?

Hybrid tribunals are supposed to overcome two types of legitimacy problems. The first is legitimacy of structure. Domestic trials in post-conflict societies lack legitimacy of structure. First, there is low public confidence in legal processes conducted by purely domestic courts. We see either continued employment of perpetrators of the mass violence in the justice system, or on the other end of the spectrum, we see employment of only victims in the justice system. This leads to concerns about fairness and impartiality. And then, of course, there will generally be a real deficit of legal skills and infrastructure because of the destruction that you see in Cambodia and in other post-conflict societies. Secondly, there are concerns about political independence. Transitional societies likely have not been democratic, and there are serious questions about the independence of various branches of the government.

On the other end of the spectrum, wholly international trials lack what I will call legitimacy of purpose. First of all, there is a lack of connection to local populations. This has been a real problem in the International Criminal Tribunal for the Former Yugoslavia because the court is so far away from the affected society that people on the ground question the tribunal’s legitimacy. They do not have information about the court’s processes, and they don’t understand what’s happening far away in the Hague. And there has not been a successful effort to disseminate the information to local populations. As a result, there is suspicion of

3. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 305-06 (2003).

4. William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729, 736-37 (2003).

the motives and the results of these trials.⁵ People question whether the ICTY is a form of victor's justice being imposed upon them. The other legitimacy of purpose problem is that international tribunals and international criminal law focus on specific individuals and specific legal questions. They address very few pieces of the bigger picture surrounding the mass violence. People on the ground may be dissatisfied with the narrow questions that the tribunals ask and the small number of cases that are brought before these courts.

This talk will further explore the question of legitimacy with respect to the Extraordinary Chambers in the Courts of Cambodia (ECCC): Who are the players? How do they define legitimacy? Is the ECCC meeting their standards?

The ECCC has been a paradigmatic example of disputes over legitimacy from the start. The United Nations and the Cambodian government have engaged in ongoing battles over the formation of a tribunal. After six years of discussion, in 2003, they finally settled on a hybrid structure. What is hybridity in the Cambodian context? I will provide three examples of areas in which this tribunal is a hybrid.

The tribunal will use Cambodian procedural law, with reference to international law where the Cambodian law is unclear. In terms of legal procedure, it is hybrid. In terms of the substantive law, it is also hybrid. This tribunal will try international crimes such as genocide and crimes against humanity, but also domestic crimes such as homicide and torture. These come from the 1956 Cambodian Penal Code, which is a post-colonial law based on the French Civil Code. Finally, the ECCC has a super-majority structure composed of Cambodian judges and international judges, requiring a vote from at least one international judge to proceed.

And of course, as Beth mentioned, just last week the New York Times ran a report about ongoing disputes between the Cambodian judges and the international judges over the internal rules.⁶ First, the admission of foreign defense counsel to represent defendants before the tribunal is a problem. The Cambodian Bar believes that it should be responsible for the admission of foreign lawyers, while the internationals think that the defense office of the ECCC should control who's admitted. The other problem is a provision that will allow the court to proceed with an indictment in the absence of the agreement of the Cambodians. These and

5. The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, and the Centre for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 131-33, 136-40 (2000).

6. Seth Mydans, *Rules Dispute Imperils Khmer Rouge Trial*, N.Y. TIMES (Jan. 26, 2007).

other long-running disputes have seriously delayed the ECCC, which, in a tribunal addressing crimes that are already thirty years old, is a serious problem.

I will next break down the disputes according to the legitimacy objections of the various players. First of all, the United Nations, international human rights NGOs, and international judges are concerned about the independence of and government interference with the court. They are concerned that the court is not going to hold up international standards respecting due process and the rule of law.

The Cambodian government on the other side presents concerns about sovereignty and legitimacy of purpose. Looking at this issue in historical context, the international community has repeatedly interfered in Cambodia's affairs without regard to, and at times with serious detriment to, human rights principles. For example, from 1965 to 1973, the United States dropped 2.7 million tons of bombs on Cambodia. That is more than all the bombs that were dropped by all of the allied forces in World War II, including Hiroshima and Nagasaki.⁷ Also, the international community recognized the Khmer Rouge even after we knew that it was a genocidal regime. The Khmer Rouge continued to hold Cambodia's seat at the United Nations from 1979 to 1992.⁸ These claims of sovereignty thus have some resonance in Cambodia; their power derives from the historical context.

Local NGOs raise structural questions about the legitimacy of a tribunal that is very closely tied to the current government in Cambodia. These structural concerns are closely tied to questions about legitimacy of purpose: the NGOs are worried that the voices of Cambodians may not be heard in this tribunal.

The final group of players is the Cambodian people. Their voices have largely been left out of the debate about this tribunal. Susanna Linton conducted a comprehensive survey in 2002⁹ and I conducted a more anecdotal survey in 1997 of Cambodian people.¹⁰ These qualitative interviews revealed that Cambodians see their judicial system as very corrupt. In other words, they share concerns about legitimacy of structure. The Cambodian people have also said repeatedly that they want to understand all the facts surrounding the Khmer Rouge regime. They want to know exactly what happened within the country and they want to know about

7. Taylor Owen and Ben Kiernan, *Bombs Over Cambodia*, THE WALRUS 62, 63, 67 (Oct. 2006), available at http://www.yale.edu/cgp/Walrus_CambodiaBombing_OCT06.pdf.

8. Human Rights Watch, *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement at Paragraph Background: A Brief History*, <http://hrw.org/backgrounder/asia/cambodia040303-bck.htm>.

9. Suzannah Linton, *RECONCILIATION IN CAMBODIA* (Documentation Center of Cambodia 2004).

10. Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER FORUM OF WORLD AFFAIRS 137 (2000).

international involvement and support for the Khmer Rouge. They likely want more facts than the tribunal will provide, so they also have concerns about legitimacy of purpose.

It is quite possible that in Cambodia we may end up with the worst of both worlds, a court that neither the international community nor the domestic population will find legitimate. What is at the root of this problem? I think a large part of the problem was that the first instinct of the international community was to look to secular political institutions as their partner in justice efforts. They attempted to build upon the capacity of hopelessly corrupt local institutions that are under the thumb of Prime Minister Hun Sen, who has ruled Cambodia since 1985 and refuses to relinquish power. The serious problem with the Cambodian government is that it is interested primarily in perpetuating its own power, but it can use the flag of sovereignty to mask its true motives.

My proposal is to argue for a different approach to hybridity, to look for a different source of legitimacy. In Cambodia, I think the answer is pretty clear and uncomplicated — it is to look to the Buddhist monkhood. This is a group that holds a great deal of legitimacy in the eyes of the Cambodian population.

I am not an expert in Cambodian Buddhism but I have read what Buddhists might say about the tribunal¹¹ and what some Buddhist monks have said.¹² According to these authorities, it is important to have a culturally relevant source of reconciliation, and law may be seen as too closely tied to politics. Justice should seek to harmonize the parties, thereby rectifying the relationship between the individual and the Dhamma, or cosmic law of existence. The Buddhist approach appears much more focused on reconciliation than the retributive focus of international criminal law. It emphasises education and rehabilitation of offenders; individual conscience is key. Buddhism would ask that the perpetrators confess and take responsibility for their actions. That is what it sees as most important.

The international community should have incorporated both these local norms and monks as local players into efforts to hold the Khmer Rouge accountable.

11. Ian Harris, *"Onslaught on Beings": A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period*, BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 59 (Jaya Ramji and Beth Van Schaack eds., Mellen Press 2005).
12. The Venerable Yos Huot Khemacaro, *Buddha's Teachings and a Tribunal for the Khmer Rouge*, 13 ON THE RECORD 6 (2000), available at http://www.advocacynet.org/news_view/news_34.html; Heng Monychenda, *Buddhism, Justice, and Reconciliation*, 13 ON THE RECORD 6 (2000), available at http://www.advocacynet.org/news_view/news_34.html.

There are several benefits and disadvantages to this approach. First, it would greatly increase legitimacy of structure and purpose in the eyes of the Cambodian society, which is, after all, what this project is all about. The tribunal should focus on the Cambodian people, on an approach that will speak to them and help them heal and reconstruct their society. Second, it will take the sting out of the government's criticisms of legitimacy of purpose. It is much harder to discredit accountability efforts on sovereignty grounds when they have been tied closely to local traditions. Third, it could broaden the vision and basis of international criminal law. As we have seen repeatedly, an individual retributive focus may not be the most effective way to address mass violence in which there has been high public participation — where almost every member of society has either been a victim or a perpetrator of violence.

There are also some problems with and challenges to a true hybridity approach. First of all, with any effort in accountability, the local government must buy in. It is going to be hard to get the current Cambodian government to buy into any limitation on their power, but this locally grounded approach would limit their objections. Second, this project may be expensive and complicated to implement. It takes a lot of effort to engage with people on the ground. But tribunals are already quite expensive and this process may be cheaper and more effective. Third, we need international community buy-in, because that is where the funding comes from. This may depend on the answer to the bigger question of whether this approach will lead to pluralism or fragmentation.

Can the international legal system withstand this level of diversity, or will such a great expansion of the boundaries of international criminal law lead to the death of international criminal law? Can Western conceptions of the rule of law incorporate and adapt to very different cultural perspectives on what accountability means? How can we reconcile an individual international criminal legal system that has primarily retributive goals with a community focused belief or morality system with rehabilitative goals? Is "true hybridity" practically feasible? That is the fundamental quandary of a federalized or regionalized internationalized system. How do we follow shared principles of justice while allowing room for local variation?

I think this is one of the most important questions of our time. As we engage in numerous projects exporting the rule of law to other nations, we have to be asking the harder questions about what form this rule of law should take. Otherwise, international criminal law, and international law more generally, may serve simply to reinforce existing power structures in the international arena. They may become

nothing more than a very expensive neocolonial exercise in relieving the guilt of the power players in the international community without responding to local concerns and rebuilding damaged societies.

*Cesare Romano, Panelist**

I was asked to come here and talk about the financing of the ECCC. Usually the topic of financing of international courts is something that makes people run for the door because it is kind of boring and it is technical. Besides, on the specific question of the Cambodian Tribunal, it has no practical significance as the question of financing has already been decided and set aside. However, it is not a purely academic exercise, because these hybrid criminal courts are going to stay with us and there are more looming on the horizon. As hybrid criminal tribunals are going to be a permanent feature of international criminal law, I think it is warranted to spend a little bit of time asking whether the way we currently finance them is the right way, or whether there are other possible alternatives.

First let me say, the way the Cambodian Tribunal is financed is very questionable. Actually, I think I want to propose that the Extraordinary Chambers in the Courts of Cambodia be renamed the amazing chambers in the courts of Cambodia because it really simply does not make sense. The ECCC is financed the same way as the Special Court for Sierra Leone is financed, that is to say, through voluntary contributions. This form of financing distinguishes these tribunals from bodies like the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda which are financed through assessed contributions. All U.N. members are supposed to pay for the budgets of these organizations, or all parties to the ICC Statute in the case of the ICC are to do their own staffing. Richer states pay larger shares than poorer ones, everything is allocated through a scale of assessment.

The Cambodian Tribunal and the Sierra Leone court are also different from two other hybrid courts — the panels that have been created in Kosovo, and the Serious Crimes Unit and panels in the courts of East Timor. These two lateral hybrid bodies were financed from the peace-keeping operations budget in place at the

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time, so again the financing was allocated through U.N. membership. The reason why the Special Court for Sierra Leone and the Cambodian Tribunal are financed through voluntary contributions is historically linked to the fact that states did not want to have to bargain similar to when the ICTY and ICTR were created. Let me give you a comparison — the projected budget of the Cambodian court is \$56 million over three years (\$18 million per year). This \$56 million for the Cambodian court comes from two sources. On the one hand, it is U.N. members that are supposed to put together \$43 million, and, on the other hand, the government of Cambodia is supposed to put \$13 million. And this undertaking reflects the hybrid nature of the tribunal.

Let's look at the U.N. side. Of the U.N. members, according to the most recent information available, only 22 states have so far pledged funds. Japan, is by far the largest contributor with \$22 million. Next is France, with \$4.8 million, and then U.K. and Australia with about \$2.5 million each. In the list there are also countries like Armenia that pledged \$1,000. Notably missing from the list is the United States. The United States has not yet put forward one dime; however, the United States has put \$125 million to finance the Special Tribunal in Iraq. Also interesting is the private funding for this tribunal. A number of Germans mentor organizations (which in turn get money from the German government) have given \$300,000. And for the first time in history, a private corporation has put money into international criminal justice; Microsoft Singapore put \$100,000. Now let us look at the Cambodian side. Cambodia is supposed to contribute \$13 million, but so far has been able to appropriate only \$5 million and is already looking around for dollars to supplement that. So basically, the whole Tribunal is basically running on a thin cup.

It is obvious to anyone who has raised funds for anything that it is a very difficult exercise and it is very time consuming. You need to spend considerable amounts of brownie points, diplomatic good will and all of that, in order to find the resources. However, time and diplomatic goodwill are invaluable resources per sé. The Secretary General of the United Nations does not have endless time to go around knocking on doors and raising funds for each and every thing the United Nations does. If the U.N. has to do this for Cambodia, it cannot do this for something else. Besides, you have to keep in mind that the funds I just mentioned are only pledged. If you look at the statistics for money that is pledged at large U.N. conferences and the money that is actually disbursed, we see that usually only about 40% of what has been pledged is disbursed. So all the money that I have previously said was for the Cambodia Tribunal is not yet in the coffer. It might

come, but if history prevails we will only have less than half of it.

Of course, funding based on voluntary contributions makes financing the international tribunal very unpredictable. We obviously did not learn any lessons from the Special Court for Sierra Leone. The Special Court for Sierra Leone was also funded, and actually it still funded, on the basis of voluntary contributions. The budget of that tribunal is \$80 million over three years, so it is slightly more than the Cambodian Tribunal. Now history tells us that after putting in considerable effort, the Secretary General managed eventually to raise two-thirds of the funds, but it was short one-third of the total.

In March 2004, the Secretary General had to ask the U.N. General Assembly to approve a subsidy of up to \$40 million which is half of the total budget for the court so that the court would be able to go on with the proceedings. It is a subsidy because the General Assembly approved these funds, which were in the coffer of the Secretary General himself. This is money that he had to spend on political missions and all the things that the Secretary General does. So he has the authorization to divert this money to the Special Court for Sierra Leone. This money was approved only on condition that as states were pledging new money and new money was coming in, meaning the United Nations was going to be reimbursed for the \$40 million. Without those funds, the Special Court for Sierra Leone would have been totally insolvent, a kind of "bankruptcy" of the tribunal and they might have to stop operation. But the fact is that already the tribunal is running beyond its schedule. It was supposed to be a three year endeavor, so therefore a budget of \$80 million. But we are running now into the fourth year and most likely there is going to be a fifth year, there is no money for this. While at the same time we are trying to find the money for the Special Court for Sierra Leone, we now have to find the money for the ECCC. So the financial problems are compounding.

Now let's look at the big picture. The general problem is that in all societies, and in all times, criminal justice is a prerogative of public authorities. There are some forms of private justice in all societies, for instance arbitration, but it is always on the civil side of disputes and never for criminal sanctions. Why criminal justice has to be financed by public authorities is obvious to even to first year law students. Criminal justice is a public good in economics. What is a public good? A public good is a good that has two features, being non-rivalrous and non-excludable. Non-rivalrous means that the use by one doesn't preclude the use by others. Unexcludable means that once you produce this good you cannot exclude other members of the society from the benefits of it.

The benefit of criminal justice, besides incarceration and sanctioning, is that you feel the whole body of international law. Especially in the field of international criminal law which is by and large a creature of ongoing trials. It is not that we wrote the codes of international criminal law in abstract and then we had the trials, rather it is an ongoing exercise or a “learning by doing” process.

There is a reason why the public needs to produce public goods. Just think, for instance, of street signs. If putting up street signs was left entirely to private parties, private parties would either fail to produce them at all, or would produce them but not in the right quantity and in the right location. So you need the public hand to redress this failure of the market. Besides, private funding of public goods is not sustainable in the long run as it creates huge free-rider issues when some are pitching in but everyone is benefiting.

I think we are now looking at international courts, especially international criminal courts, as a cost instead of an investment. Spending money on international criminal justice is exactly the same thing as spending money on infrastructure, on building highways, building dams, bringing electric power. We are spending money on building the infrastructure of a international society. Just think where we would be today had Winston Churchill had his way in Nuremberg when he said “Why do we have to spend time and resources to bring to trial these Nazi leaders? Why don’t we simply deal with them the good old way of putting them against the wall and shooting them?” We wouldn’t have the Nuremberg Trials, the court which was the financing-funding basis from which we are developing a whole international field of criminal tribunals. Without Nuremberg we would not have had the Yugoslavian International Tribunal. Without the Yugoslavian Tribunal, we would not have more international criminal law. We are spending money for the future. You cannot look at the budget of these tribunals as a mere cost, like “I want to buy a new plasma TV.” It’s not the same thing. It’s like more, “I’m putting money in my college fund.”

Unfortunately, when it comes to the question of financing these international courts, we are still in the Stone Age. For example, we have a very viable alternative to financing our court with a thin cup just right under our nose but no one is looking at it. We could finance international hybrid criminal courts the same way as the Caribbean Court of Justice is funded. The Caribbean Court of Justice is one of the largest international courts ever created. It started operating last year and is an organ of the organization of the CARICOM, the Caribbean community and Common Market, its original organization. The heads of states of CARICOM asked the Caribbean development bank to raise, on international

markets, \$100 million from private investors. This \$100 million is put in a trust fund which is administered not by the governments, but by private individuals with purely financial criteria of profits and increase in debits. Then the Caribbean development bank lends the money to CARICOM members so that member states can meet their obligations of contributing to the budget of the organization. The funds are then divided amongst the members according to an agreed scale of assessment.

What is the advantage of doing this instead of going throughout with a thin cup? First, it is a one shot exercise. You do it once, and then you don't have to do it again and again. You save the Secretary General of the United Nations a lot of time and you would not have to spend all that goodwill each and every time. You do not get into embarrassing situations where you have to tell countries that they are not contributing, but you are not contributing to it either. "I want to have the heat to get elected on the security council so, therefore, when is the next tribunal, so let me write you a check of a million dollars so I look good." That's exactly what happens right now.

Borrowing to finance international criminal tribunals is good because then we are building something for future generations. When you borrow money you are physically transferring debt to future generations. But we are also giving them something, so therefore we can also ask them to pitch in for this effort. For instance, if the U.N. was to create a senior trust fund of only \$200 million which could be spread over a number of years and is definitely a figure within the reach of many states. Calculations say that it could be enough to fund at least two hybrid courts at any given time. The other interesting thing is that if you created a trust fund like that, private parties could contribute to it. (Private parties cannot currently give money to international criminal courts directly. With the Microsoft Singapore example, it is excused because they are giving money for tools that are going to be used rather than giving money directly.) But if you have the trust fund, private parties can contribute to the trust fund since there is one degree of removal between the court and the money coming from the private parties. So the question of the court's independence is not an issue.

This trust could tap into greater resources. Take the \$200 million reference before; there are enough millionaires on this planet that are willing to put at least half of that in the trust by just writing a check, and again, you only would have to raise funds once. Besides, this would be very easy on the legislature. For instance, let's say that Japan pledges \$22 million. The government of Japan would have to go back to the legislature and ask to approve these funds and allocate them for the

next year's budget. This is cash basically that is transferred from one pocket to the next. You go through these mechanisms and basically the Japanese government spreads these out over five years, and it just flies under the radar of the legislature. They would not have to go through those practical promises discussed above.

To conclude, as I said, Japan is the largest contributor to this endeavor. About three years ago I was summoned by the Japanese ambassador to the United Nations and asked to have tea in his office. He wanted to talk about the financing of his baby — the ECCC. Japan was exploring whether it should contribute money to this or not. So I went and had tea with the Japanese ambassador to the United Nations. I explained the idea of creating a trust fund to him. It was feasible; it could be done; it was a good thing. The whole time, he staring. He looked at me and nodded. Then, when I finished, he grunted and put down his cup of tea and moved on to another argument. But I think I made some inroads. Now the story is that he is no longer the Japanese ambassador to the United Nations. I don't know if this is because he returned to his government and talked about these crazy ideas but I hope that is not the case.

*Leakhena Nou, Panelist**

I am a medical sociologist by training, and not a lawyer or legally trained. What I have done is investigate the underlying psychosocial legacies that are affecting the Cambodian population in the post-Khmer Rouge era. Let me just give you a little bit of background in terms of the literature on stress and trauma affecting Cambodians. All Cambodians, regardless of their age, gender or class, including those who escaped the Khmer Rouge as well as refugees living in the United States or other host countries, are affected by what we call *collective trauma*. Women are considered at the highest risk for developing mental health problems. Also at high risk are refugees coming to a new country: people who experienced war and devastation, and who lost everything from their homeland—their loved ones, their property, their sense of cultural familiarity, and, of course, their social status.

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Many of the Cambodian refugees who experienced the Khmer Rouge suffer from assimilation and adjustment difficulties, such as language barriers, culture shock, lack of social support, and social isolation. They continue to face the stresses of war, resettlement, and ongoing life events. Some of the symptoms may surface immediately or be delayed for years after the traumatic event. There are cultural differences that often prevent early detection of culture-based psychiatric symptoms, as well as cultural differences in understanding and defining mental health, depression, and anxiety. The victims themselves do not even understand what they are experiencing, and may not recognize their symptoms of mental illness. There is also a stigma of mental health treatment.

A lot of my respondents and other researchers have found that Cambodians suffer what we call the “Kit Chroen” syndrome, which is the “thinking too much” syndrome. It is more culturally appropriate to say “I think a lot,” as opposed to “I’m depressed, I want to commit suicide.” *Kit Chroen* reflects a state of stress, depression, and frequent traumatic events. When victims or respondents or survivors experience the *Kit Chroen* syndrome, they have an imbalance in the sense that their mind, body, and spirit feel disconnected. Cambodian society is very focused on Buddhism, in which there is a need and desire for balance or social harmony. Some of the symptoms of post-traumatic stress disorder (PTSD) include headaches, memory problems, high anxiety levels, muscular pains, and a numbing of overall responsiveness. Many of my respondents reported, “My spirit is somewhere. Physically, I’m here but I’m not spiritually here. My spirit is still in Cambodia.” These PTSD symptoms are often referred or connected to intense memories of traumatic events in the past.

Many respondents or victims of the Khmer Rouge tend to report their mental health problems by *somatizing* their symptoms in the form of depression, PTSD, and other mental health-related symptoms. They experience intense fear, horror, or a sense of hopelessness because of the loss of loved ones; or they have been victims of and/or witnesses to torture and serious harm, including seeing loved ones being executed.

This is a theoretical model (the Khmer Stress Process Model) that I’ve used to look at the post-Khmer Rouge generation, those who were born after the Khmer Rouge. I also looked at the survivors, or the victims, who actually lived through the horrors from 1975 to 1979. Social-structural variables are just the social disposition of individuals in society. Aside from other structural variables I studied, I focused on four main variables for my postdoctoral study: gender, social status, age, and employment status. I also looked at their religious belief system,

income, and family background before and after the war. I also looked at their personal relationships, and other social criteria.

Based on their position in society, the stress process exposes victims to certain kinds of stresses. In particular, I looked at negative life events and daily hassles. All of us have experienced negative life events or daily hassles; I wanted to find out if the respondents had access to certain kinds of mediators, in terms of social support and coping styles. My respondents reported utilizing both types of coping styles — problem solving and emotion-focused coping. I looked at these social-structural variables, and the interrelationship between the variables (e.g., gender, class, negative life events, social support) between and within each domain (social structural context, stressors, mediators, and stress process outcomes) to determine the impact on individuals' mental health problems and ability to adjust to their current lives. The mental health problems include psychological and somatic symptoms, PTSD, and, of course, quality of life.

As background, I surveyed approximately 1,300 young Cambodian college students (technical students across the Kingdom of Cambodia) in the summer of 1997. I left Cambodia before the war, so I had no firsthand experience of living in Cambodia during the Khmer Rouge. In 1997, there was a coup d'état, which, as a graduate student with 12 research assistants under me, was quite frightening. My committee at the time watched this whole situation unfold on CNN and they were quite nervous that one of their graduate students was missing in action in the field. From 1997 through 2000, I surveyed approximately 1,300 students across the country in private universities, public universities, and technical universities. It was quite difficult, given the logistics, the poor infrastructure, and lack of communication. The data collection took three years, followed by one year to analyze data and one year to write up the analysis.

During my postdoctoral work, I took this very same model and applied it to Cambodian adult refugees in the state of Massachusetts. I wanted to identify whether there were any similar symptoms with the two different populations thirty years after the Khmer Rouge. Some scholars in the field, such as Mollica and his colleagues, reported that Cambodians on average reported 14 to 15 major traumatic events in their lives ranging from severe beatings to starvation, witnessing execution, and being in prison or tortured.¹³ Another scholar, Marshall, and his colleagues conducted their study in 2001 and recently reported, in 2005, that twenty years after resettlement 62% of Cambodian refugees who lived through this

13. Dr. Richard Mollica is a psychiatrist and co-director of the Harvard Program in Refugee Trauma.

horror suffer from PTSD and 51% suffer from depression.¹⁴ They go on to say that the rates of mental illness are 6 to 17 times higher than the national average, with 42% reporting a combination of PTSD and depression. According to Marshall and his colleagues, the more traumas respondents endured, the worse their symptoms.

In my postdoctoral work, I found that, although I didn't study PTSD as a diagnostic outcome, the young, educated respondents I surveyed still had high rates of PTSD symptoms. These are non-clinical individuals. When combined with daily hassles, these factors negatively impacted their mental health development. My respondents, on average, reported 43 daily hassles within two weeks. The young adults in Cambodia who were part of my survey reported fifty hassles. All of us have hassles, right? But do we have forty or fifty within a two-week period? In my research, I found that daily hassles were a more significant factor, or had a more significant impact, than negative life events. In other words, having daily hassles compounded by the lingering PTSD actually made their mental health worse.

The explanations for Cambodian illness, negative life events, and well-being are inextricably linked to natural environment and social order, our world, or supernatural forces. Illness, as viewed by the sufferer, may have moral, social, and psychological meanings. All my respondents reported feelings of hopelessness about the future. With the tribunal sort of in a state of chaos, my Cambodian respondents are very hopeless about its prospects. They also reported feeling very self-conscious with others, feeling that most people cannot be trusted (including the foreign jurisdiction), trouble concentrating, and trouble remembering things. These symptoms are shared by both the older (Khmer Rouge) and the younger (post-Khmer Rouge) generations. Some of the specific symptoms reported by my respondents included depression, poor sleep, low energy, headaches, body aches, social isolation, withdrawal, and constant worrying. They described feeling as though their head and chest were about to explode. My respondents further described having short-term memory loss, somatic complaints, flat affect, and suicidal ideations. Also, it is important to remember the great stigma attached to seeking mental health treatment that discourages Cambodians from seeking the help they need. When one describes oneself as crazy, there's a real fear of that stigma, as well.

Although the Cambodian adult refugees in my study live in the United States, issues of community, homeland politics continue to negatively impact their lives.

14. Grant N. Marshall et al., 5 J.A.M.MED.ASS'N 571, 572-78 (2005).

They recognize a lack of improvement at the individual, community, and national levels that causes embarrassment and identity confusion for them. There continues to be a loss of Cambodian resources and land. Every time there is foreign intervention in the country or into Cambodian politics, it causes distress. This hybrid court procedure is an example of such foreign intervention. They believe that the monarchy is ineffective,¹⁵ and that the encroaching territorial and immigration issues are a problem.

Specific stressors among the young student respondents include difficulty concentrating on their homework, headaches, stomach aches, witnessing violence, love or romantic problems, poor living conditions or poverty. There is also a significant immigration issue in Cambodia: Cambodian citizens feel threatened by a large Vietnamese population due to job loss and the spread of STDs and HIV/AIDS. This immigration threat is compounded by incompetent political leaders, corruption, social injustice, a high unemployment rate, and constant fear of personal harm. These are some of the specific stressors. I have a whole bunch, but I have highlighted a few points just to give you the idea.

At the end of my survey sessions, I asked the respondents what would help to improve their quality of life. The students talk about sitting alone to calm themselves. Some have suicidal ideations, some seek support from the Buddhist monks, and some organize to demonstrate against the government. Some male students, aside from seeking help from family or friends, also mentioned that they turn to commercial sex workers. Basic needs, of course, are important for the respondents in the United States as well as the young adults in Cambodia. Important quality-of-life indicators include feeling attractive, having a sense of worth and confidence, having good family relationships and friendships, having an incorrupt government, and focusing more efforts on preserving the Khmer identity as opposed to relying too much on foreign intervention and foreign cultural influences.

In conclusion, it is important as the tribunal proceeds to have dialogue and planning about how to bring legitimacy, truth and justice for the Cambodian people. It is also important to think about the interactive relationship between cultural, psychosocial, political and historical dimensions, and to help promote individual as well as communal healing and well-being. My data collection was comprehensive in the sense that I conducted extensive focus group discussions and collected extensive survey data with respondents. The focus group sessions were

15. Cambodia is a constitutional monarchy.

an attempt to capture indigenous conceptions of stress, coping, and psychological indicators.

It was important to visually document what the respondents were saying, so that they could see that the truth was being recorded and to provide assurance that their voices were being heard. During my postdoctoral survey at University of Massachusetts in Boston, it was important to reach out to the Cambodian community in Lowell, Lynn, and Revere — the three largest Cambodian populations in the state of Massachusetts. It was critical to relate to respondents at their level, making sure that I captured their voices, as opposed to imposing my Western scientific model onto this understanding of their experiences.